Supreme Court, U.S.
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No. 01-309

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE McCLARAN, and JIM GATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS

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PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Larry Hope, is an individual who was the plaintiff in the district court and the appellant in the court of appeals. The Respondents, Mark Pelzer, Gene McClaran, and Jim Gates, are all individuals who were the defendants in the district court and the appellees in the court of appeals. Contrary to the caption submitted by petitioner, Jim Gates is not the same as Keith Gates. At the time of the events relevant to this case, Jim Gates was a Lieutenant at Limestone Correctional Facility. Keith Gates was a Correctional Officer I. App. 35. Petitioner did not identify Lieutenant Gates as "Jim Gates a/k/a Keith Gates" in his complaint, referring instead to "Lut. [Lieut.] Gates." App. 7. He did not serve Officer Keith Gates with his complaint. The first time petitioner began referring to Lieutenant Gates as "Jim Gates a/k/a Keith Gates" was when his counsel appeared on his behalf and submitted his Second Affidavit. App. 43. Petitioner never moved to amend his complaint to name Keith Gates as a defendant.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDINGS BELOW i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 17

ARGUMENT 19

I. Pelzer, McClaran, and Gates Did Not Violate the Eighth Amendment by Putting Hope on the Restraining Bar in Accordance With Regulation 429 19

A. Pelzer, McClaran, and Gates did not act with "deliberate indifference" to Hope's health and safety by putting him on the restraining bar in accordance with Regulation 429 20

B. Pelzer, McClaran, and Gates did not deny Hope the "minimal civilized measure of life's necessities" by putting him on the restraining bar in accordance with Regulation 429 23

II. Even If This Court Determines That Pelzer, McClaran, and Gates Violated the Eighth Amendment by Putting Hope on the Restraining Bar, They Are Entitled to Qualified Immunity from This Suit 31

A. "Material similarity" is a workable and flexible standard that advances the purposes of this Court's qualified immunity doctrine 32

TABLE OF CONTENTS – Continued

Page

B. Use of the restraining bar in accordance with Regulation 429 was neither patently cruel and unusual nor materially similar to any form of punishment deemed cruel and unusual by a court 39

III. This Court Should Reject the United States' Suggestion That It Remand For Petitioner to Engage in Discovery 44

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES:

Adkins v. *Rodriguez*, 59 F.3d 1034 (10th Cir. 1995) 38

Affiliated Ute Citizens of Utah v. *United States*, 406 U.S. 128 (1972) 34

Anderson v. *Creighton*, 483 U.S. 635 (1987).... 32, 33, 36, 45

Ashby v. *Dees*, No. CV-94-U-0605-NE (N.D. Ala. 1994).... 15, 42

Austin v. *Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998).... 14, 22

Basic Inc. v. *Levinson*, 485 U.S. 224 (1988).... 34

Bell v. *Wolfish*, 441 U.S. 520 (1979) 30, 31

Birrell v. *Brown*, 867 F.2d 956 (6th Cir. 1989).... 38

Bogard v. *Cook*, 586 F.2d 399 (5th Cir. 1978).... 38

Butz v. *Economou*, 438 U.S. 478 (1978) 32

Campbell v. *Sikes*, 169 F.3d 1353 (11th Cir. 1999) 27

Dale v. *Murphy*, No. CV-85-1091-H-S (S.D. Ala. 1986).... 15, 42

Estelle v. *Gamble*, 429 U.S. 97 (1976) 20

Farmer v. *Brennan*, 511 U.S. 825 (1994).... 20, 21, 27, 28

Ford v. *Wainwright*, 477 U.S. 399 (1986).... 29

French v. *Owens*, 777 F.2d 1250 (7th Cir. 1985) 25

Fuentes v. *Wagner*, 206 F.3d 335 (3rd Cir. 2000) 21

Gates v. *Collier*, 501 F.2d 1291 (5th Cir. 1974) 42, 43

Harlow v. *Fitzgerald*, 457 U.S. 800 (1982).... 32, 33, 45

TABLE OF AUTHORITIES – Continued

Page

Harmelin v. *Michigan*, 501 U.S. 957 (1991).... 24, 29

Harris v. *Thigpen*, 941 F.2d 1495 (11th Cir. 1991) 29

Hartsfield v. *Vidor*, 199 F.3d 305 (6th Cir. 1999).... 27

Hollis v. *Folsom*, No. CV-94-T-0052-N (M.D. Ala. 1994).... 15, 42

Hudson v. *McMillian*, 503 U.S. 1 (1992) 23

Hutto v. *Finney*, 437 U.S. 678 (1978) 28

Johnston v. *Hopper*, No. CV-97-N-937-NE (N.D. Ala. 1998).... 15

Key v. *McKinney*, 176 F.3d 1083 (8th Cir. 1999).... 27

Kimble v. *Hightower*, No. CV-95-B-1328-S (N.D. Ala. 1996).... 15

Lane v. *Findley*, No. CV-93-C-1741-S (N.D. Ala. 1994).... 15, 42

Lassiter v. *Alabama A&M University*, 28 F.3d 1146 (11th Cir. 1994).... 35

Lewis v. *Smith*, 855 F.2d 736 (11th Cir. 1988).... 11

LoConte v. *Dugger*, 847 F.2d 745 (11th Cir. 1988) 11

Lopez v. *Robinson*, 914 F.2d 486 (4th Cir. 1990).... 38

Malley v. *Briggs*, 475 U.S. 335 (1986).... 33

Marsh v. *Butler County*, 268 F.3d 1014 (11th Cir. 2001).... 38

Ort v. *White*, 813 F.2d 318 (11th Cir. 1987).... 40, 41

Osolinski v. *Kane*, 92 F.3d 934 (9th Cir. 1996).... 37

Pell v. *Procunier*, 417 U.S. 817 (1974) 28

TABLE OF AUTHORITIES – Continued

Page

Prater v. *Dahm*, 89 F.3d 538 (8th Cir. 1996) 37

Priester v. *City of Riviera Beach*, 208 F.3d 919 (11th Cir. 2000) 35

Rhodes v. *Chapman*, 452 U.S. 337 (1981)...23, 28, 29, 30, 31

Rodgers v. *Jabe*, 43 F.3d 1082 (6th Cir. 1995)..... 38

Rummel v. *Estelle*, 445 U.S. 272 (1980) 24, 29

Saucier v. *Katz*, 121 S. Ct. 2151 (2001) 19, 32, 33, 34

Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 33

Seltzer-Bey v. *Delo*, 66 F.3d 961 (8th Cir. 1995) 37

Sims v. *Mashburn*, 25 F.3d 980 (11th Cir. 1994)..... 40

Smith v. *Mattox*, 127 F.3d 1416 (11th Cir. 1997) 36

Thomas v. *Arn*, 474 U.S. 140 (1985) 11

Thomas v. *Ramos*, 130 F.3d 754 (7th Cir. 1998)..... 37

Thompson v. *Oklahoma*, 487 U.S. 815 (1988)..... 29

Trop v. *Dulles*, 356 U.S. 86 (1958)..... 23

United States v. *Lanier*, 520 U.S. 259 (1997).... 34, 35, 36

Vinson v. *Thompson*, No. CV-94-A-268-N (M.D. Ala. 1994).....15, 42

Wells v. *Franzen*, 777 F.2d 1258 (7th Cir. 1985) 26, 40

Whitley v. *Albers*, 475 U.S. 312 (1986).....25, 31

Whitson v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala. 1994).....15, 42

Williams v. *Burton*, 943 F.2d 1572 (11th 1991) 27, 40

Williams v. *Delo*, 49 F.3d 442 (8th Cir. 1995) 38

TABLE OF AUTHORITIES – Continued

Page

Williamson v. *Anderson*, No. CV-92-H-675-N (M.D. Ala. 1993).....15, 42

Wilson v. *Layne*, 526 U.S. 603 (1999).....43, 44

Wilson v. *Seiter*, 501 U.S. 294 (1991).....19, 20

Wood v. *Strickland*, 420 U.S. 308 (1975) 33

STATUTES, REGULATIONS, AND RULES:

18 U.S.C. 242..... 35

28 U.S.C. 636..... 11

42 U.S.C. 1983.....9, 15, 19, 36, 42

Alabama Department of Corrections Regulation 429..... *passim*

MISCELLANEOUS:

http://www.getchwood.com/punishments/curious/chapter-4.html..... 25

http://www.ncdc.noaa.gov/cgi-bin/fsod_xmgr/tmp/fsod_24228.gif 4

http://www.ncdc.noaa.gov/cgi-bin/fsod_xmgr/tmp/fsod_22614.gif 8

http://onlinedictionary.datasegment.com/word/Pillory 25

STATEMENT OF THE CASE

In 1995, respondents Sergeant Mark Pelzer, Officer Gene McClaran, and Lieutenant Jim Gates were each prison officers at Limestone Correctional Facility in Capshaw, Alabama, where petitioner Larry Hope was imprisoned. The Alabama Department of Corrections has a written policy, Regulation 429, that authorizes prison officers to handcuff inmates who refuse to work or who disrupt work crews to a "restraining bar" – a chest-high lateral pole. In May and June of 1995, respondents twice had to put Hope on the restraining bar at Limestone because he disrupted work crews. Hope alleges that these actions violated the Eighth Amendment. Pelzer, McClaran, and Gates contend that putting Hope on the bar in compliance with the safety procedures set forth in Regulation 429 did not violate the Eighth Amendment. Even if this Court rules that they did violate the Eighth Amendment, Pelzer, McClaran, and Gates contend that the law was not clearly established in 1995 and that they accordingly enjoy qualified immunity from this suit.

1. In putting Hope on the restraining bar, respondents followed Regulation 429 of the Alabama Department of Corrections (the "DOC"). Regulation 429 provided that, when an inmate "refuse[d] to work" or was "otherwise disruptive to the work squad," prison officers were authorized to "handcuff" the inmate to a "permanently affixed restraining bar." App. 102-03. (Regulation 429 did not permit "tying" the inmate to the bar, as was perhaps inadvertently suggested by the phrasing of Question 2 of the Questions Presented.)

Regulation 429 set forth a detailed list of procedures that the officers were to follow when they employed this measure. Hope has not alleged that respondents Pelzer, McClaran, or Gates ever departed from these procedures at any time during this case. App. 5-11, 43-48.

The most significant procedural requirement of Regulation 429 was that the inmate could be left on the bar only so long as he continued to refuse to work. "At any time during the day," Regulation 429 stated, "the inmate can tell an officer that he is ready to go to work." App. 103. "He will be allowed to join his assigned squad for that day and begin work." App. 103. The inmate thus held the keys to his release in his own pocket.

Before putting an inmate on the bar, moreover, officers were required to contact the health care unit to make certain that the inmate did not have a "medical stop-up" or health condition that was preventing him from working. App. 103. If the officers had been required to use force to bring the inmate to the bar, they were required to contact a nurse who would check the inmate's condition. App. 103. The restraining bar had to "be located no more than 50 feet from an officer," ensuring that an officer would always be on hand in case the inmate had a problem or indicated a willingness to return to work. App. 103.

If the inmate continued to refuse to work, Regulation 429 required prison officers to attend to the inmate's health and safety while he remained on the bar:

- "Fresh water will be available to the inmate."
- "He will be given the opportunity to go to the bathroom once each hour."

- "He will be fed a sack lunch at the restraining bar."
- "Inmates placed on the bar that are taking prescribed medication will be given their medicine at the appropriate time at the restraining bar."

App. 103.

Regulation 429 also required that the prison officers keep a detailed activity log of the time the inmate spent on the bar. App. 104. The officers were required to explain their reasons for using the restraint and to make notations when the inmate got on and off the bar; when the inmate accepted or rejected a meal; when the inmate accepted or rejected water; when the inmate accepted or rejected a restroom break; when the inmate accepted or rejected prescribed medication; and when the inmate received medical attention. App. 106. The log required the prison officers to note their observations of the inmate every fifteen minutes. App. 106.

The longest that an inmate could remain on the bar, no matter how disruptive or intransigent he may have been that day at work, was until his fellow inmates on the work squads returned to the prison. Regulation 429 required that the inmate on the bar "be checked back into the institution after the last squad is checked in." App. 103. He would also be "written a disciplinary." App. 103.

2. On May 11, 1995, at about 11:40 a.m., respondent Officer Gene McClaran was alone supervising a work crew away from Limestone Prison. Hope was part of that crew. App. 34. Hope admits that he got into a "verbal disagreement" with another inmate on the crew named

Tony Perkins. App. 9. In his incident report, Officer McClaran recounts that Hope "raised the swing blade he was working with and drew back with intentions of striking Inmate Perkins." App. 34.

Officer McClaran ordered Hope to stop, racked the slide bolt of his rifle closed, and ordered the entire work crew to get on the ground. Hope and Perkins remained standing. McClaran again ordered Hope and Perkins to get on the ground. Hope retorted: "fuck you." Finally, respondent Sergeant Mark Pelzer arrived at the scene to assist McClaran, and Hope and Perkins submitted. App. 34.

Another officer, who is not a defendant in this case, transported Hope and Perkins back to Limestone. App. 34-35. At approximately 12:20 p.m., Hope was put on the restraining bar. App. 35, 38. Hope equivocates as to which officer was the one who actually put him on the bar. In his second affidavit, he says he believes it was Sergeant Pelzer. App. 45. But the incident report appended to his affidavit identifies two other officers (not defendants in this case) as the ones who cuffed him to the bar, and he appears to defer to that report in his affidavit. App. 35, 45. Despite this equivocation, respondents will concede, for summary judgment purposes only, that Pelzer was the officer who cuffed Hope to the bar on May 11.

The activity log for May 11 shows that Hope was offered water and restroom breaks every fifteen minutes. He declined the offers on all but one occasion, when he went to the bathroom. App. 39. Temperatures that day ranged between 58 and 75 degrees. See http://www.ncdc.noaa.gov/cgi-bin/fsod_xmgr/tmp/

fsod_24228.gif. Hope asserts that his arms grew tired while on the bar and that the cuffs cut into his wrists as he changed positions. App. 45. The nurse who examined Hope later that day, however, found that he had "[n]o bruises, contusions, abrasions or lacerations" and "[n]o s/s [signs or symptoms] of trauma or illness." App. 12.

At 2:40 p.m., Officer Keith Gates (a different Gates than the Lieutenant Jim Gates who is a respondent in this case[1]) released Hope from the restraining bar and sent him back to the work crew. App. 35. Hope claims he was released after a superior officer determined that Perkins was the inmate responsible for the altercation. App. 45. Hope and Perkins later signed a "peace agreement" – an agreement to live with each other without physical conflict. App. 35.[2]

Contrary to the statement of the Eleventh Circuit (Pet. App. 9-10) and of petitioner in his principal brief (p. 3), Hope did not allege or present evidence in the district court that he told any prison officer – much less one of the respondents – that he was prepared to return peaceably to work, but was instead forced to stay on the bar. App. 5-11, 43-48.

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[1] Hope has never presented any evidence that "Officer Keith Gates" was the same person as "Lieutenant Jim Gates." See Parties to the Proceedings Below, *supra*.

[2] Without a peace agreement, the officers may have been required by DOC policy to put Hope and Perkins on an "enemy list," which would prevent them from ever being housed in the same facility while in prison. The DOC employs this measure to comply with its Eighth Amendment obligation not to put inmates in situations where they are in danger of violence by other inmates.

Most important, Hope did not allege or present evidence that Pelzer, McClaran, or Gates violated Regulation 429 in any way from the time Pelzer put him on the bar to the time he was released. He did not allege or present evidence that they denied him food, water, or a bathroom break, or that they abused him in any other way. He did not allege or present evidence that they were even in the vicinity of the restraining bar during that entire period. App. 5-11, 43-48.

3. On June 7, 1995, at approximately 10:30 a.m., Hope failed to exit the bus with his fellow inmates to begin another work crew. Hope admits that he was napping and that he did not comply when Officer Ted Loggins ordered him to get off the bus. App. 10. Hope claims that Loggins then grabbed him by the neck and that he retaliated by grabbing Loggins by the neck. App. 10. The officers who were present, however, stated that it was Hope who initially made an aggressive movement toward Loggins and attempted to grab Loggins by the neck. Pet. Supp. App. 13. In any event, several other officers had to intervene to help Loggins subdue Hope. App. 26, 30. Hope originally named Loggins and four other officers as defendants in this case and alleged that they used excessive force during this incident. App. 10. He has since voluntarily dismissed these five defendants along with his claim of excessive force. Supp. App. 9.

Following the altercation with Loggins, Sergeant Pelzer put leg irons on Hope and escorted him to Lieutenant Gates's station wagon. App. 17, 26, 30. Hope was first taken to the health care unit. App. 10. At 11:15 a.m., the nurse observed that Hope's "speech was normal," that he had a "[f]ew scattered bruises" on his left scapula and a

"[r]eddened area" on his right shoulder, but "[n]o bleeding," "[n]o knots" on his head, and no "visual disturbances." Hope was also "[a]mbulating well." A determination was made that Hope needed no medical treatment and he was released to the correctional officers. App. 13.

Lieutenant Gates then handcuffed Hope to the restraining bar. App. 46. Hope contends that other officers were present to assist Gates. App. 10. Officer McClaran may have been one of them. In his response to Hope's complaint, McClaran admitted that he "did place Inmate Hope on the Restraining Bar." App. 24. It is not clear whether McClaran was referring to the May 11 incident, when he ordered that Hope be put on the bar, or to the June 7 incident, but the magistrate judge inferred from McClaran's statement that McClaran put Hope on the bar on June 7. Pet. Supp. App. 14 n. 5.

Hope also states that one of the officers present said: "take that rag off of him. I have shit I need to clean off the van." App. 10. Hope does not claim, however, that Gates or McClaran made this remark. Hope asserts that the officers made him take off his shirt. App. 10. The pictures Hope submitted with his second affidavit, which he says were taken on June 7, show that he was not wearing his prison-issue shirt but that he was wearing another short-sleeved shirt and a cap. App. 55-57. Despite this evidence, the magistrate judge found that Hope did not have a shirt while he was on the bar on June 7. Pet. Supp. App. 14. Respondents did not object to this finding in the district court and so must be deemed to have conceded its accuracy for purposes of this petition.

Hope stayed on the bar for about seven hours. Hope says that, while on the bar, he became hot, thirsty, and sunburned. Hope also says that his arms grew tired and that his wrists swelled while he was on the bar and remained swollen for a day. App. 10, 47-48. The temperatures that day were between 64 and 87 degrees. See http://www.ncdc.noaa.gov/cgi-bin/fsod_xmgr/tmp/fsod_22614.gif.

Hope did not allege or present evidence in the district court that Pelzer, McClaran, or Gates violated Regulation 429 from the time Gates put him on the bar to the time he was released by an unnamed officer. He did not allege or present evidence that they denied him food, water, a bathroom break, or that they abused him in any other way. He did not allege or present evidence that they were even in the vicinity of the restraining bar during the entire period in question. App. 5-11, 43-48.

Contrary, again, to the statement of the Eleventh Circuit (Pet. App. 9-10) and of Hope in his opening brief (p. 3), Hope did not allege or present evidence in the district court that he told any prison officer – much less Pelzer, McClaran, or Gates – that he was ready to return to work, but that the officer instead forced him to stay on the bar. Also contrary to the statement of the Eleventh Circuit (Pet. App. 3 & n. 1, 6), Hope did not allege or present evidence that he ever asked for but was denied a bathroom break. No activity log of his time on the bar that day has been introduced into the record.

Hope admits that he received water at least once or twice while on the bar. App. 47. He states that he was

"deprived of water" for a three-hour stretch, but he does not identify the officers responsible for supplying him with water during this period. App. 47. He also alleges that two unidentified prison officers – not the respondents – taunted him by giving water to some dogs and by bringing water near him and then kicking it away. App. 47, 50; Pet. Supp. App. 26 n. 10.

4. On November 11, 1996, Hope filed a pro se complaint in the United States District Court for the Northern District of Alabama, seeking declaratory relief and damages under 42 U.S.C. 1983 for alleged violations of his constitutional rights. Hope named Sergeant Pelzer, Officers McClaran, Kent, Jackson, Loggins, Stephenson, McGee, and Lieutenant Gates as defendants. App. 7. In the affidavit attached to his complaint (App. 9), Hope alleged that Officer McClaran had "mistakenly" put him on the restraining bar on May 11, 1995, and that Officers Kent, Jackson, Loggins, Stephenson, and McGee had used excessive force against him on June 7, 1995. He made no specific allegations against either Sergeant Pelzer or Lieutenant Gates. App. 9-11.

On November 3, 1997, Hope's current counsel entered his appearance on Hope's behalf. He dropped the claim of excessive force and dismissed Loggins, Jackson, McGee, Stephenson, and Kent as defendants. He also filed a supplemental affidavit in which Hope stated that it was either Pelzer or Gates who had cuffed him to the bar on May 11, 1995, and that it was Gates who had cuffed him to the bar on June 7, 1995. App. 43-55, 45-46. Hope made no further allegations and presented no additional evidence concerning the respondents' involvement in the case.

During the two and one half years between his initial appearance and the district court's award of summary judgment, Hope's counsel did not supplement the record with any other evidence of the respondents' involvement in the case. Neither did he move to amend the complaint to add other prison officers as defendants, such as the two officers who allegedly taunted Hope and kicked his water away. In a separate class action brought to enjoin use of the restraining bar, Hope's counsel identified one of those two officers by name, yet he did not join that officer as a defendant in this case. Pet. Supp. App. 26 n. 10.

On March 10, 2000, the magistrate judge issued a Report and Recommendation that the district court grant summary judgment to the respondents. Pet. Supp. App. 6. The judge did not find that any prison officer, much less one of the respondents, had forced Hope to stay on the bar after he had expressed a willingness to go to work. The judge did not find that any prison officer, much less one of the respondents, had ever denied Hope a bathroom break while on the bar. The judge found that Hope had received water "at least once or twice" both times he was on the bar, and although the judge credited Hope's allegation that two unidentified officers had taunted him and kicked water away from him, the judge correctly noted that those officers were not Pelzer, McClaran, or Gates. Pet. Supp. App. 25-27.

The only involvement that the magistrate judge found on the part of Pelzer, McClaran, and Gates was that they had either ordered Hope be put on the bar or had cuffed him to the bar themselves. Pet. Supp. App. 12, 14. Finding no clearly established constitutional precedent

prohibiting prison officers from employing a measure like Regulation 429, the magistrate judge recommended that the district court rule that Pelzer, McClaran, and Gates enjoyed qualified immunity from Hope's Section 1983 complaint. Pet. Supp. App. 33.

Under 28 U.S.C. 636(b)(1), Hope had ten days in which to object to the magistrate judge's findings of fact; otherwise, he would be deemed to have admitted them and to have waived his right to contest those findings on appeal.[3] Hope filed an objection in which he made legal arguments against the magistrate judge's legal conclusion but did not contest any of the judge's factual findings. App. 93. On March 24, 2000, the district court issued a memorandum opinion adopting the magistrate judge's factual findings and recommendation and awarded summary judgment to the respondents. Pet. Supp. App. 1-5.

5. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's judgment on qualified immunity. The court also ruled, however, that the respondents' use of the restraining bar was cruel and

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[3] This Court has held that the courts of appeals may adopt standards, including standards that limit appeals, for cases in which the district court adopts the recommendations of a magistrate judge. *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985). The Eleventh Circuit has held that the failure to object, after notice, to the magistrate's factual findings precludes later attack on those findings. *Lewis* v. *Smith*, 855 F.2d 736 (11th Cir. 1988); *LoConte v. Dugger*, 847 F.2d 745 (11th Cir. 1988); see also *Thomas* v. *Arn*, 474 U.S. at 146 n. 4. When a court of appeals has adopted such a rule and a party fails to object to the facts or conclusions of law found by a magistrate judge, he has waived those issues on appeal in that circuit. *Thomas* v. *Arn*, 474 U.S. at 150.

unusual punishment under the Eighth Amendment. In so ruling, the court made a number of factual suppositions it was not entitled to make.

First, the court of appeals found that, on both May 11 and June 7, 1995, the prison officers violated Regulation 429 by leaving Hope on the bar when he was willing to go back to work. Pet. App. 9-10. The magistrate judge never made any such finding, and Hope waived his right to press this issue on appeal when his counsel failed to object to the magistrate judge's factual findings in the district court.

Even if Hope did not waive the issue, the summary judgment record does not support the court of appeals' finding that the prison officers violated Regulation 429. The only allegation or evidence Hope has ever given about his disposition toward work in this case is the following statement about the May 11 incident: "I had neither refused to work nor encouraged other inmates not to work at the time of that incident." App. 44. Hope may not have refused to work or encouraged other inmates not to work, but he was "disruptive to the work squad" under Regulation 429 when he forced Officer McClaran to train a rifle on him in order to prevent him from striking a fellow inmate with a swing blade. App. 34. He was also "disruptive to the work squad" on June 7, by failing to exit the work bus when ordered and by getting into an altercation with several prison officers. App. 10, 102.

Furthermore, Hope has never alleged that once he was on the bar he told any prison officer, much less one

of the respondents, that he was prepared to return peaceably to work. App. 5-11, 43-48. Nonetheless, the court of appeals found it "improbable that had Hope said, 'I want to go back to work,' a prison guard would have left his post at Limestone to drive Hope back to the work site." Pet. App. 10. The court said it was "more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson." Pet. App. 10. The court of appeals had no record basis or procedural warrant to engage in such speculation.

Second, the court of appeals found that Hope "was given no bathroom breaks" on June 7, 1995. Pet. App. 3 & n. 1. Hope, however, never even made such an allegation, either in his pro se complaint or in the second affidavit he filed with the assistance of counsel. In addition, the record contains no activity log of Hope's time on the bar on June 7. The court of appeals implied, without any record support, that respondents were somehow responsible for this omission, and then asserted that the absence of the activity log meant that "Hope's allegations about the lack of . . . bathroom breaks [we]re uncontested." Pet. App. 3 n. 1. As the plaintiff, Hope bore the burden of alleging and adducing evidence that he was denied a bathroom break. Respondents cannot be held liable for failing to contest allegations that Hope never made.

What evidence there is in the record points to the opposite conclusion – that Hope was not denied a bathroom break. Regulation 429 entitled Hope to hourly restroom breaks. App. 103. The activity log for May 11 shows that the officers offered him restroom breaks every fifteen minutes. App. 39. In the absence of even a scintilla of evidence to the contrary, it must be assumed that the

prison officers complied with prison policy, treated Hope as they had in the past, and permitted him to use the bathroom.

Third, the court of appeals saddled respondents with responsibility for every wrongful act alleged on the part of any prison officer in the case. The court's use of passive voice in its description of facts (e.g., Pet. App. 2-3) and in its statement of conclusions (e.g., Pet. App. 4 ("Hope's Constitutional Rights Were Violated")) enabled it to elide the fact that Hope never alleged that Pelzer, McClaran, and Gates did anything other than initially put Hope on the restraining bar. The court did not limit its constitutional analysis to respondents' alleged involvement. The court chronicled every misdeed alleged by Hope (and some not alleged by Hope) in the course of making its constitutional ruling. The court even charged respondents – low-ranking officers without law degrees or involvement in the making of DOC policy – with constructive awareness of a 1994 U.S. Department of Justice (DOJ) report opining that the restraining bar was unconstitutional. Pet. App. 6.

Petitioner and his amici have used a similar tactic, citing findings from other cases brought against different defendants concerning use of the restraining bar. See, e.g., Brief for the United States 3-4. In particular, they cite the opinion in *Austin* v. *Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998), a class action brought against the Commissioner of the Alabama DOC to enjoin a number of practices, including use of the restraining bar. The *Austin* opinion is a preliminary ruling, not a final judgment that the Commissioner has had an opportunity to appeal. The district court has stayed the case and will not issue final

judgment until after this case. The court's findings, moreover, are general, describing an aggregate of alleged abuses on the part of unnamed prison officers throughout the state. The court does recount the June 7, 1995 incident involving Larry Hope, but discusses only the allegations made against the unnamed officers – again, not the respondents – who allegedly taunted Hope while he was on the bar and denied him water. Those findings cannot be attributed to respondents, much less have preclusive effect against respondents under any theory of collateral estoppel.

6. In the eight Section 1983 cases that counsel have been able to find in which an inmate sued an Alabama prison officer for handcuffing him to a stationary object for refusing to work, the district courts held that the restraint did not violate the Eighth Amendment. Four of these involved use of the restraining bar. *Dale* v. *Murphy*, No. CV-85-1091-H-S (S.D. Ala. 1986) (light pole); *Williamson* v. *Anderson*, No. CV-92-H-675-N (M.D. Ala. 1993) (fence); *Hollis* v. *Folsom*, No. CV-94-T-0052-N (M.D. Ala. 1994) (fence); *Vinson* v. *Thompson*, No. CV-94-A-268-N (M.D. Ala. 1994) (restraining bar); *Ashby* v. *Dees*, No. CV-94-U-0605-NE (N.D. Ala. 1994) (fence); *Lane* v. *Findley*, No. CV-93-C-1741-S (N.D. Ala. 1994) (restraining bar); *Kimble* v. *Hightower*, No. CV-95-B-1328-S (N.D. Ala. 1996) (restraining bar); *Johnston* v. *Hopper*, No. CV-97-N-937-NE (N.D. Ala. 1998) (restraining bar; Gates was a co-defendant). In one other case involving the restraining bar, the district court dismissed the complaint on qualified immunity grounds. *Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala. 1994).

The only case of which counsel are aware (prior to this one) in which a court has held that use of the restraining bar was unconstitutional was the class action in *Austin* v. *Hopper*. *Austin* was decided in 1998, three years after the events in this case, not in 1995, as suggested by the ACLU in its brief (pp. 1, 22-24). The *Austin* court did not rule, moreover, that the restraining bar or Regulation 429 was unconstitutional per se. Rather, the problem the court found was that many Alabama prison officers were not using the restraining bar in accordance with Regulation 429: e.g., by denying inmates water while on the bar, by putting prisoners on the bar for actions that did not constitute a refusal to work or a disruption of the work crew, by not first checking whether the inmate had a medical stop-up. 15 F. Supp. 2d at 1239-48. The court gave the DOC Commissioner the opportunity to revise its restraining bar policy to include procedural safeguards to ensure that prison officers would use the bar in the manner that Regulation 429 already required. The Commissioner has done so, filing an extensive revised policy that proposes, inter alia, to install surveillance cameras to monitor how the officers treat inmates on the post. The Commissioner awaits a decision on that policy by the district court, which, as noted, has stayed the case pending resolution of *Hope* v. *Pelzer*. Until the district court rules on the revised policy in *Austin*, the court has directed the Commissioner to halt use of the restraining bar in Alabama prisons. 15 F. Supp.2d at 1273.

SUMMARY OF ARGUMENT

1. Respondents Pelzer, McClaran, and Gates did not subject petitioner Hope to cruel and unusual punishment by putting him on the restraining bar in compliance with Regulation 429. To prevail on his Eighth Amendment conditions-of-confinement claim, Hope must show that respondents acted with "deliberate indifference" to his health and safety, and that they denied him the "minimal civilized measure of life's necessities." All that Pelzer, McClaran, and Gates are alleged to have done in this case is twice put Hope on the restraining bar because he disrupted work crews. In doing so, they followed Alabama Department of Corrections Regulation 429. Hope has not alleged that they departed from Regulation 429 in any way. Under Regulation 429, Hope was entitled to food, water, bathroom breaks, and medical attention while on the bar. He was under constant supervision. At any time, if he agreed to return to work without disruption, he could get off the bar. These circumstances establish neither the subjective nor the objective prong of the test for whether a condition of confinement violates the Eighth Amendment.

2. Even if it turns out that Pelzer, McClaran, and Gates did violate the Eighth Amendment, they did not violate a right that was "clearly established" at the time of the events in this case, so as to overcome their qualified immunity. To be "clearly established," a constitutional or statutory right must either be obvious from the text or arise from judicial precedent that is "materially similar" to the case at hand. Material similarity is a workable and flexible standard of comparison that ensures a public official has fair warning of his or her

legal responsibilities in a particular situation. The more fact-intensive the governing legal standard, the more similarity is required between the present case and a past one, in order to defeat the public official's qualified immunity. The conditions-of-confinement test is a very fact-intensive standard. Hope thus must demonstrate a high degree of similarity between his allegations in this case and the facts of a prior case holding that a condition of confinement violated the Eighth Amendment.

Far from making clear that use of the restraining bar in accordance with Regulation 429 violated the Eighth Amendment, the relevant case law in 1995 indicated that it was constitutional. The Eleventh Circuit and other courts of appeals have refused to find Eighth Amendment violations or have awarded qualified immunity in a number of prison cases presenting conditions of physical restraint more prolonged and more severe than Hope faced by being on the restraining bar. In six pre-1995 Section 1983 cases that counsel has been able to locate in which an inmate sued an Alabama prison officer for handcuffing him to a stationary object, the district courts held that the restraint did not violate the Eighth Amendment. Two of these cases involved use of the restraining bar. Especially because Pelzer, McClaran, and Gates were following a DOC policy that authorized them to use the restraining bar in the manner that they did, they are entitled to qualified immunity from this lawsuit.

3. This Court should not remand for discovery. Petitioner's counsel has had two and a half years to discover facts and make more specific allegations against respondents. One of the purposes of qualified immunity is to dispose of cases at an early stage, so as to minimize the

expense and chilling effect that litigation poses to public officials. That purpose would be defeated if Hope were given even more time to engage in discovery.

ARGUMENT

I. Pelzer, McClaran, and Gates Did Not Violate the Eighth Amendment by Putting Hope on the Restraining Bar in Accordance With Regulation 429.

This Court granted the petition for writ of certiorari on two questions, both related to whether respondents Pelzer, McClaran, and Gates enjoy qualified immunity from petitioner's Section 1983 suit. Last Term in *Saucier* v. *Katz*, however, this Court made clear that, in Section 1983 cases, the question of constitutionality must be addressed before the question of qualified immunity. This Court framed the inquiry as follows: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 121 S. Ct. 2151, 2156 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*

Hope asserts that the respondent prison officers subjected him to cruel and unusual punishment by putting him on the restraining bar. "[I]f the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge," however, and is instead alleged to result from a condition of confinement, "some mental element must be attributed to the inflicting officer before it can qualify" as an Eighth Amendment violation. *Wilson*

v. *Seiter*, 501 U.S. 294, 300 (1991). Hope thus must show not only that Pelzer, McClaran, and Gates inflicted pain that was "sufficiently serious," but also that they exhibited "deliberate indifference" to his health and safety. *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994) (quotations omitted); *Wilson*, 501 U.S. at 303; *Estelle* v. *Gamble*, 429 U.S. 97, 105-06 (1976) (inadvertent failure to provide medical care to inmate not cruel and unusual).

Pelzer's only alleged involvement in this case is that he transported Hope back to the prison on May 11, 1995, and may also have put Hope on the bar that day. McClaran's only alleged involvement in this case is that he ordered Hope be put on the bar on May 11; he may also have helped put Hope on the bar on June 7, 1995. Gates's only alleged involvement is that he helped put Hope on the bar on June 7. The sum total of these allegations is that respondents put Hope on the bar twice but had nothing to do with him thereafter. The mere act of putting Hope on the bar – in compliance with DOC policy and on the assumption that he would remain on the bar only so long as he refused to comply with his obligation to work – does not constitute a violation of either the subjective or the objective prong of the *Farmer/Wilson* test.

A. Pelzer, McClaran, and Gates did not act with "deliberate indifference" to Hope's health and safety by putting him on the restraining bar in accordance with Regulation 429.

Farmer v. *Brennan* made clear that the standard for "deliberate indifference" is "subjective recklessness as

used in the criminal law." 511 U.S. at 839. This means that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Id.*

The record is devoid of evidence that Pelzer, McClaran, or Gates had the necessary awareness or drew the required inference. Petitioner asserts that the restraining bar exposed him to the risks of pain, dehydration, sunburn, wrist injury, and harassment. Pet. Br. 19. Putting Hope on the bar in the manner prescribed by Regulation 429 exposed him, at best, to a marginal risk that these events would come to pass. Compare *Fuentes* v. *Wagner*, 206 F.3d 335, 340 (3rd Cir. 2000) (strapping inmate to chair for eight hours in accordance with prison policy, causing "loss of feeling in his hands and feet, cuts on his wrists and ankles where he had been handcuffed and shackled, leg cramps, discomfort in his arms, restricted breathing, and back pain," did not constitute deliberate indifference).

Both times Pelzer, McClaran, or Gates put Hope on the bar, a nurse checked Hope's medical condition first. Other prison officers were on hand to watch Hope once he was on the bar. Pelzer, McClaran, and Gates had no reason to assume that these officers would not provide him with food, water, bathroom breaks, and everything else required by Regulation 429. They had no reason to believe that Hope would not be permitted to leave the bar as soon as he agreed to return peaceably to work. Most of

all, they had no reason to anticipate the alleged failure of the other officers to provide Hope with water during one three-hour stretch, or the alleged harassment of Hope by the two officers who kicked his water away and gave it to the dogs. Under these conditions, the risks to Hope of pain, dehydration, sunburn, wrist injury, and harassment were hardly greater and perhaps even less than that faced by his fellow inmates who dutifully worked in the sun all day.

In stretching to find evidence of deliberate indifference on the part of respondents, the court of appeals took judicial notice of a DOJ report to the Governor of Alabama, regarding the use of the restraining bar at Easterling Correctional Facility in southern Alabama. Pet. App. 6. The Alabama DOC replied to DOJ, acknowledging that if used improperly, the restraining bar could threaten inmate health and safety, but maintaining that the procedures set forth in Regulation 429 negated that threat. *Austin*, 15 F. Supp. 2d at 1249. The court of appeals held that "this exchange between the DOJ and the DOC demonstrates that the DOC was aware of the substantial risk of harm created by the use of the hitching post for prolonged periods of time." Pet. App. 7.

Even if awareness of risk could be imputed to DOC from a non-binding legal opinion with which it pointedly and reasonably disagreed, it is beyond comprehension that such awareness could in turn be imputed to respondents. Pelzer, McClaran, and Gates worked at Limestone Facility in northern Alabama, over 260 miles away from the Easterling Facility that DOJ inspected. They were low-ranking officers, whose job descriptions required no more than a high school degree, and their input into DOC

policy-making would have been minimal at best. That they would have known anything about the DOJ report is rank speculation.

B. Pelzer, McClaran, and Gates did not deny Hope the "minimal civilized measure of life's necessities" by putting him on the restraining bar in accordance with Regulation 429.

"Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' extreme deprivations are required to make out a conditions-of-confinement claim." *Hudson* v. *McMillian*, 503 U.S. 1, 9 (1992) (excessive force against prisoner may be cruel and unusual if it inflicts wanton and unnecessary pain though no serious injury) (quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981) (double-bunking of inmates in single-occupancy cells not cruel and unusual)). "[O]nly those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Hudson*, 503 U.S. at 9 (quoting *Rhodes*, 452 U.S. at 347). This proposition "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (cruel and unusual to require denationalization of certain wartime deserters). "Today the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime." *Rhodes*, 452 U.S. at 346 (citations omitted).

1. "Outside the context of capital punishment, successful challenges to the proportionality of particular

sentences have been exceedingly rare." *Rummel* v. *Estelle*, 445 U.S. 272 (1980) (mandatory life sentence under recidivism statute for obtaining $120.75 by false pretenses not cruel and unusual). The principle "does not require strict proportionality between crime and sentence" but forbids only "extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ.) (upholding sentence to life without parole for conviction of possession of more than 650 grams of cocaine). Assuming that the proportionality requirement applies to discipline imposed for violation of internal prison procedure, it is difficult to imagine a measure more proportionate than one that the prisoner can terminate at his own initiative simply by agreeing to do what he was supposed to be doing in the first place. In addition, the temporary discomfort of being cuffed to a bar was not out of proportion to Hope's misdeeds in this case.

2. The real question, then, is whether use of the restraining bar as prescribed by Regulation 429 inflicts "unnecessary and wanton infliction of pain." Hope and amicus American Civil Liberties Union (ACLU) contend that the restraining bar is a modern-day pillory. This is a nice sound bite but a specious legal and historical analogy. The pillory was a horizontal, split, wooden frame with holes holding the hands level with and parallel to the neck in a locked, forward position. It was used to stretch the neck, permit the prisoner's ears to be nailed to the board, or otherwise subject the prisoner to public humiliation. See http://www.getchwood.com/

punishments/curious/chapter-4.html; http://onlinedictionary.datasegment.com/word/Pillory. It was a truly "unusual" form of punishment that would likely be deemed "cruel" as well under any conceivable conditions of modern use. The restraining bar, by contrast, consists of a pair of handcuffs and a chest-high horizontal post. "Handcuffs, shackles and irons are not per se unconstitutional." ACLU Br. 20. Even the court of appeals agreed that the restraining bar could be used "for a period of time" in order "to quell a threat or restore order." Pet. App. 11. The same cannot be said of the pillory.

Turning to modern precedent, the ACLU suggests that "prolonged physical restraint" violates the Eighth Amendment in two circumstances: (1) when "movement is denied" and "the health of the individual is threatened," Br. 20 (quoting *French* v. *Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985)); or (2) when the restraint "could [not] plausibly have been thought necessary" to achieve some legitimate penological interest. Br. 20-21 (quoting *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986)). Respondents do not quarrel with this basic legal framework, but simply point out that neither circumstance was present in this case.

First, Pelzer, McClaran, and Gates did not immobilize Hope or leave him in a contorted position that in any way threatened his health. He could move his head, his shoulders, his torso, his legs, and most of his arms. He was able to stand fully erect and lean his shoulders against the bar to take some pressure off the muscles in his arms and chest. The second time he was on the bar, he was cuffed to the vertical pole at the end of the restraining

bar, against which he could lean his entire body. App. 55. Hope was also permitted bathroom breaks, during which he was able to move about and stretch, and he could get off the bar any time he agreed to return to work. Even the bad acts alleged on the part of the other non-defendant officers – while inexcusable and clearly a violation of Regulation 429 – did not subject Hope to a great health risk. Hope alleges that the other officers deprived him of water for at most three hours, leaving him "thirsty" but not by his account dehydrated or faint. App. 11, 47. In fact, the only injuries that Hope contends he actually suffered that day were sunburn and sore wrists that "appeared to be bruised" and remained swollen for a day thereafter. App. 48, 50. These pains are not dissimilar in kind or in degree to those likely suffered by his fellow inmates who did go cooperatively to work.

The ACLU's cases, and others, establish that a far more debilitating and health-threatening form of restraint is necessary to violate the Eighth Amendment. In *French*, the Seventh Circuit rejected a prisoner's claim that lack of regular exercise violated the Eighth Amendment and indicated that prison officials would have to restrain a prisoner's movement to the point that his muscles were "allowed to atrophy" in order to violate the Eighth Amendment. 777 F.2d at 1255. In *Wells* v. *Franzen*, the Seventh Circuit held that shackling a prisoner by his four limbs to a bed for nine days straight, without bathroom breaks or regular access to water, did not violate the Eighth Amendment. 777 F.2d 1258, 1260-61, 1264. The court characterized the plaintiff's complaints of abrasions, bruises, and restricted blood flow as "minor discomfort" that did not establish an Eighth Amendment

violation of "wanton infliction of pain" by officials. *Id.* at 1264. In *Key* v. *McKinney*, the Eighth Circuit held that putting an inmate in handcuffs and leg shackles for twenty-four hours for throwing water on an officer did not violate the Eighth Amendment. 176 F.3d 1083, 1086 (8th Cir. 1999). And in *Hartsfield* v. *Vidor*, the Sixth Circuit held that restraining a prisoner to a bed for two eight-hour periods, during which time he was denied fresh water or bathroom breaks and was forced to sit in his own urine, did "not fall below the minimal standards of civilized society." 199 F.3d 305, 309-10 (1999) (citing *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994)).

The Eleventh Circuit has also rejected claims of prolonged physical restraint involving far harsher conditions than those alleged by Hope, although in a slightly different legal context – allegations of excessive force in violation of the Eighth Amendment. In these cases, officers had to restrain prisoners to prevent them from hurting themselves or others. In *Campbell* v. *Sikes*, the Eleventh Circuit held that leaving a mentally disturbed prisoner in an L-shaped restraint for periods of 27, 1½, 5, 16, and 66½ hours did not violate the Eighth Amendment. 169 F.3d 1353, 1375-78 (1999). And in *Williams* v. *Burton*, the Eleventh Circuit held that gagging and binding a violent prisoner in four-point restraints for twenty-eight consecutive hours did not violate the Eighth Amendment. 943 F.2d 1572, 1574 (1991).

To be sure, Hope was uncomfortable on the restraining bar and became more uncomfortable the longer he refused to work. But that was the whole point of the exercise: to induce Hope to return peaceably to work. Unlike the cases above, Hope held the keys to his release

in his own pocket, and the maximum time he could have spent on the bar for refusing to work was a single work day. The Eighth Amendment "does not mandate comfortable prisons," *Rhodes*, 452 U.S. at 349 – and permits prison conditions that are "restrictive and even harsh," *Farmer* v. *Brennan*, 511 U.S. at 833 (quoting *Rhodes*, 452 U.S. at 347) – especially when the inmate can remove the source of his discomfort just by complying with his obligation to work.

Second, the restraining bar has ample penological justification. This Court has acknowledged "rehabilitation" as well as "internal security" as valid penological objectives. *Pell* v. *Procunier*, 417 U.S. 817, 822-23 (1974). Work squads are an important part of the rehabilitative program of the Alabama correctional system, and the restraining bar is an effective means of impelling inmates to work. Officers cannot just return unruly inmates to the prison. That would in effect reward the inmates for their misbehavior by giving them the day off. Officers also cannot segregate every inmate who disrupts a work crew, because Alabama prisons are filled to capacity and do not have many spare cells. Segregation cells also pose independent constitutional problems. *Hutto* v. *Finney*, 437 U.S. 678, 687 (1978) (leaving prisoners in segregated cells for extended periods of time was cruel and unusual). Officers may charge inmates with rule violations – resulting in the potential loss of privileges such as store and telephone use, visitation, and good-time credit – but not all inmates earn those privileges. Furthermore, these charges require due process hearings and are not a quick solution to the immediate concerns of restoring discipline and showing other inmates that cooperation is required on work squads.

Petitioner and the ACLU urge this Court to give constitutional weight to the opinions of their experts condemning the use of the restraining bar. While the opinions of experts may be instructive in some areas, "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Rhodes*, 452 U.S. at 348 n. 13 (quotation omitted). Petitioner and the ACLU also urge this Court to give weight to the fact that Alabama is the only state currently using the restraining bar. They do not show, however, whether other states have considered and rejected use of the bar or whether other states once used the bar but now do not. Compare *Ford* v. *Wainwright*, 477 U.S. 399, 408 n. 2 (1986) (noting that twenty-six states had enacted statutes explicitly forbidding execution of insane); *Thompson* v. *Oklahoma*, 487 U.S. 815, 829 & n. 30 (1988) (observing that eighteen states had enacted statutes explicitly establishing minimum age for capital punishment). "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282. "Diversity not only in policy, but in the means of implementing policy, is the very *raison d'etre* of our federal system." *Harmelin*, 501 U.S. at 990 (Scalia, J., joined by Rehnquist, C.J.). See also *Harris* v. *Thigpen*, 941 F.2d 1495, 1517 (11th Cir. 1991) (upholding Alabama practice of segregating all inmates with AIDS against constitutional challenge, when Alabama was the only state following that practice).

This Court has acknowledged that "the problems that arise in the day-to-day operation of a corrections facility

are not susceptible of easy solutions." *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979) (double-bunking of inmates in single-occupancy cells did not violate due process).

> Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. . . . [J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

Id. at 547-48 (citations omitted). Respondents urge this Court not to assume that their superiors in the Alabama Department of Corrections are insensitive to the values that animate the Eighth Amendment "or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system." *Rhodes*, 452 U.S. at 352. This Court has repeatedly admonished that cases such as this one pose questions regarding constitutional requirements, and that this Court should provide judicial answers to those hard questions rather than judicial opinions as to how best to operate prisons.

Id. at 351; *Whitley* v. *Albers*, 475 U.S. 312, 321-22 (1986) (shooting prisoner while quelling riot without prior verbal warning was not cruel and unusual); *Bell* v. *Wolfish*, 441 U.S. at 539.

The teaching of this Court's conditions-of-confinement jurisprudence is that no part of prison life is ideal, nor can it be. In the judgment of the Alabama Department of Corrections, use of the restraining bar as prescribed in Regulation 429 was a cost-effective, safe and relatively pain-free way to impel inmates to work. Pelzer, McClaran, and Gates did not offend "evolving standards of decency" by deferring to the judgment of their employer and putting Hope on the bar in accordance with Regulation 429.

II. Even If This Court Determines That Pelzer, McClaran, and Gates Violated the Eighth Amendment by Putting Hope on the Restraining Bar, They Are Entitled to Qualified Immunity from This Suit.

Respondents Pelzer, McClaran, and Gates did not violate Hope's "clearly established" rights. They could not have been reasonably expected to anticipate that putting him on the restraining bar – in compliance with an administrative regulation that afforded Hope food, water, bathroom breaks, and medical attention and that allowed Hope to determine for himself when he would be released – constituted a violation of the Eighth Amendment. Prison officers could not do their jobs if every action they took in accordance with department procedure were subject to that kind of doubt. Respondents are accordingly entitled to qualified immunity from this lawsuit.

A. "Material similarity" is a workable and flexible standard that advances the purposes of this Court's qualified immunity doctrine.

The first question this Court directed the parties to address is whether state officials "are entitled to qualified immunity unless they have violated statutory or constitutional rights 'clearly established' by a case presenting facts 'materially similar' to those in the plaintiff's case." Except for extreme cases, in which the right violated is readily apparent without the aid of judicial precedent, respondents submit that the question should be answered in the affirmative. The requirement of "material similarity" gives public officials the necessary elbow room to perform their duties zealously. It protects them from the expenses of litigation, keeps their energy focused on pressing public issues, and diminishes the chilling effect of the threat of lawsuits on people's willingness to seek public office. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). At the same time, it affords a needed measure of discipline when an official takes action "not distinguishable in a fair way" from other action that has been declared unlawful by a court. *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001).

Qualified immunity doctrine requires that questions of constitutional law be viewed from the perspective of the "reasonable official." *Saucier*, 121 S. Ct. at 2156; see also *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Were it otherwise, liability could not be calibrated to the proper level of deterrence – "encouraging the vigorous exercise of official authority," *Butz* v. *Economou*, 438 U.S. 478, 506 (1978), while at the same time discouraging violations of individual rights. To be effective, the doctrine must

enable government officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson*, 483 U.S. at 646 (quotations omitted).

"The relevant, dispositive inquiry," therefore, "in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 121 S. Ct. at 2156. When the right is clearly established, holding public officials personally liable for violations of that right has adequate deterrent effect. When it is not clearly established, holding officials personally liable for violations of the right would over-deter and discourage the "principled and fearless decision-making" that is desired of public officials. *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975); See also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). This is especially true in the prison context, where public officials "must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication" of their responsibilities. *Scheuer* v. *Rhodes*, 416 U.S. 232, 246 (1974). This Court has thus declared that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986).

"Material similarity" is a workable and flexible standard that vindicates these purposes. The requirement of "similarity" between past cases and the present ensures that the public official receives warning of his or her legal responsibility. The requirement of "materiality" fine-tunes the necessary element of similarity to ensure that the warning is "fair" without requiring the sort of precise

factual identity that would render Section 1983 meaningless. *Saucier*, 121 S. Ct. at 2157 (qualified immunity available unless facts are "not distinguishable in a fair way" from the facts of a previous case); cf. *United States* v. *Lanier*, 520 U.S. 259, 265-67 (1997). As required by qualified immunity doctrine, it answers the question "how much similarity is required" from the perspective of the public official, pegging the degree of similarity required to the ability of the "reasonable official" to detect that similarity in the immediate circumstances with which he or she is presented. In this sense, the concept of material similarity in qualified immunity doctrine may draw helpful meaning from the well-developed concept of material misrepresentation in federal securities law, which answers the question "how much misrepresentation is required" from the perspective of the reasonable investor. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231-32 (1988); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 153-54 (1972). Habeas jurisprudence, as suggested by amici Missouri et al., may also provide significant guidance.

Their stated positions notwithstanding, petitioner and his amici all advocate some sort of material similarity standard. Indeed, petitioner concedes that a requirement of material similarity "might not skew the qualified immunity inquiry if the requirement were interpreted with appropriate flexibility." Br. 17. Petitioner and the ACLU's disagreement with the Eleventh Circuit's material similarity standard is not one of kind but of degree. They purport to draw but one principled distinction between their standard and that of the Eleventh Circuit.

They charge that the Eleventh Circuit uses material similarity to avoid granting immunity in cases with outrageous facts like *United States* v. *Lanier*, where the rights violation is so blatant it need not correspond to the facts of a particular judicial precedent in order to be chargeable to the defendant public official. 520 U.S. 259 (state judge prosecuted under 18 U.S.C. 242 for sexually assaulting several women in his chambers).

Respondents submit that petitioner and his amici, especially the ACLU, have created a straw man in their characterization of Eleventh Circuit precedent on material similarity. The Eleventh Circuit acknowledges, and respondents readily concede, that a rights violation may sometimes be so plain that material similarity to a prior case is unnecessary to defeat immunity. Public officials are charged with knowledge not just of decisional law but of constitutional and statutory text as well. To use an example close to home, prison officers are as likely to be familiar with the constitutional phrase "Cruel and Unusual Punishment" as they are with the facts of any given Eighth Amendment case. "Occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law." *Lassiter* v. *Alabama A&M University*, 28 F.3d 1146, 1150 n. 4 (11th Cir. 1994). In extreme cases, an official may stray " 'so far beyond the hazy border' between constitutional and unconstitutional conduct" that the official "had to know he was violating the Constitution even without case law on point." *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926

(11th Cir. 2000) (quoting *Smith* v. *Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997)).

In most Section 1983 cases, however, the right claimed does not spring obviously from the constitutional or statutory text, and the question whether the right exists is not one that can be answered without the aid of judicial elaboration. A plaintiff who seeks to defeat qualified immunity in such cases cannot just allege violation of an "abstract" or "general right", but must show that the constitutional right he asserts was clearly established in a "particularized, and hence more relevant, sense." *Anderson* v. *Creighton*, 483 U.S. 635, 639-40 (1987). The issue, then, is the degree of similarity that is required between past and current cases. That is the issue addressed by the concept of materiality.

The requirement of materiality means that, the more fact-intensive the governing legal standard, the more similar the instant case must be to a past one for the reasonable public official to have fair warning of his legal responsibility. Sometimes the rule that emerges from decisional law may be discernible at a high enough level of abstraction that public officials can be expected to know and apply that rule in a wide variety of cases. Cf. *Lanier*, 520 U.S. at 271 ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question"). This is not an exception to the material similarity standard but rather a healthy example of its flexibility in application. The ACLU (Br. 5-7) offers the example of racial discrimination, which respondents accept. If Hope had charged, for example, that certain officers told him they put him on the restraining bar because of his race, the officers

would likely not be entitled to qualified immunity, regardless of whether there was a previous case in which prison officers had been held liable for using the restraining bar in a manner that was racially discriminatory. The only material fact making the hypothetical case similar to countless past ones would have been the racial discrimination on the part of the officers. The use of the restraining bar to accomplish the discrimination would have been immaterial. A reasonable official would have seen the similarity regardless.

Respondents submit that the question whether a condition of confinement is cruel and unusual rests far to the fact-intensive side of the spectrum. It inevitably requires consideration of a wide variety of circumstances and the balance of competing individual and public interests. Nationwide, the courts of appeals almost always award qualified immunity to prison officials in conditions-of-confinement cases. See, e.g., *Thomas* v. *Ramos*, 130 F.3d 754 (7th Cir. 1998) (official who allegedly refused to allow inmate to exercise in yard while he was confined in disciplinary segregation for 70 days was entitled to qualified immunity); *Osolinski* v. *Kane*, 92 F.3d 934 (9th Cir. 1996) (prison officials who failed to repair oven that injured an inmate were entitled to qualified immunity against inmate's Eighth Amendment claim); *Prater* v. *Dahm*, 89 F.3d 538 (8th Cir. 1996) (prison officials who failed to protect inmate from an attack from a fellow inmate were entitled to qualified immunity against inmate's Eighth Amendment claim); *Seltzer-Bey* v. *Delo*, 66 F.3d 961 (8th Cir. 1995) (prison officials were entitled to qualified immunity from inmate's claim that his placement in a stripped cell for two days without clothing,

bedding, or running water, with a concrete floor, a concrete slab for a bed, and cold air blowing on him constituted cruel and unusual punishment); *Adkins* v. *Rodriguez*, 59 F.3d 1034 (10th Cir. 1995) (prison official who allegedly sexually harassed a female inmate and appeared in her cell without authorization was entitled to qualified immunity against the inmate's Eighth Amendment claim); *Williams* v. *Delo*, 49 F.3d 442 (8th Cir. 1995) (prison officials were entitled to qualified immunity against inmate's claim that the conditions of his stripped cell violated Eighth Amendment); *Rodgers* v. *Jabe*, 43 F.3d 1082 (6th Cir. 1995) (prison officials were entitled to qualified immunity against inmate's allegations he was denied adequate outdoor exercise in violation of his Eighth Amendment rights); *Lopez* v. *Robinson*, 914 F.2d 486 (4th Cir. 1990) (prison officials were entitled to qualified immunity from inmates' claims that alleged inadequate ventilation system, incident in which inmates were locked down for 12 to 24 hours without running water in their cells, alleged inadequacy of hot water for showers, alleged cold cells during the winter, and the practice of double-celling inmates violated Eighth Amendment); *Birrell* v. *Brown*, 867 F.2d 956 (6th Cir. 1989) (prison officials were entitled to qualified immunity from inmate's claims that under-staffing of institution and practice of housing inmates before desired or planned renovations at the facility could be completed violated the Eighth Amendment); *Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978) (prison officials were entitled to qualified immunity against inmate's claims that "summary punishments," a shooting by a trustee guard, and a stabbing by a fellow inmate amounted to Eighth Amendment violations); but see

Marsh v. *Butler County*, 268 F.3d 1014 (11th Cir. 2001) (sheriff who failed to address deteriorating prison conditions that for the most part had been identified as Eighth Amendment violations in prior cases was *not* entitled to qualified immunity). This Court should accordingly require a much higher degree of similarity between this case and past ones than petitioner and his amici urge is necessary to deprive respondents of their qualified immunity.

B. Use of the restraining bar in accordance with Regulation 429 was neither patently cruel and unusual nor materially similar to any form of punishment deemed cruel and unusual by a court.

The second question the Court directed the parties to address is the specific one: whether putting Hope on the restraining bar "under the circumstances that must be taken as true at the summary judgment state of this case" violated Hope's "clearly established" rights, thereby depriving Pelzer, McClaran, and Gates of qualified immunity. As argued in Part I, even viewed through the prism of a summary judgment motion, the record does not establish that Pelzer, McClaran, and Gates violated any of Hope's Eighth Amendment rights, clearly established or not.

1. This is not the extreme case in which the punishment is patently cruel and unusual. Not even the court of appeals below held that the restraining bar was unconstitutional in all uses and conceded that it could be used at least as a means of temporary restraint. App. 9.

2. The relevant case law in 1995 did not come close to establishing a clear rule that the restraining bar was unconstitutional when used in accordance with Regulation 429. As noted above, in the 1991 case of *Williams* v. *Burton*, the Eleventh Circuit had held that gagging and binding a violent prisoner in four-point restraints for twenty-eight consecutive hours did not constitute excessive force in violation of the Eighth Amendment. 943 F.2d 1572. In two cases that did not involve physical restraint but rather confinement to a cell for extended periods, the Eleventh Circuit had also rejected claims under the Eighth Amendment. *Sims* v. *Mashburn*, 25 F.3d 980 (1994) (confining prisoner to a stripped cell for twenty-nine hours, disconnecting the water to his toilet, and removing all his clothing except his undershorts did not constitute excessive force in violation of the Eighth Amendment); *Ort* v. *White*, 813 F.2d 318 (1987) (confining prisoner to sally port and denying him water for refusing to work did not constitute excessive force in violation of the Eighth Amendment). And in *Wells* v. *Franzen*, 777 F.2d 1258 (1985), the Seventh Circuit had held that shackling a prisoner by his four limbs to a bed for nine days straight, without bathroom breaks or regular access to water, did not violate the Eighth Amendment. *Id.* at 1258, 1260-61, 1264. These cases had all involved prison conditions or applications of force more severe than the restraining bar, yet the courts had found no Eighth Amendment violations.

The 1987 Eleventh Circuit decision in *Ort* v. *White* bears closer attention. The inmate in *Ort* complained that a prison officer named Holladay did not allow him to "drink any water until he began to perform his assigned

tasks like the rest of his squad." 813 F.2d at 320. The court rejected the inmate's claim that the denial of water violated the Eighth Amendment, on reasoning that is appropriate to this case:

> It is clear from these facts that Ort's several refusals to carry the water keg and his selective work stoppages were spontaneous events occurring while his farm squad was out on field duty. The late squad, of which Ort seemed a charter member, remained away from the prison for the entire day, so Officer Holladay had no one to whom he could turn over an unruly or recalcitrant inmate and no way to contain such a troublemaker or segregate him from the rest of the squad. These conditions distinguish the present situation from being merely the everyday case of an inmate violating a rule or regulation while within the prison walls. This scenario dictated that the lone prison officer present on the scene take some immediate action to maintain order and discipline among the prisoners in the field. Holladay's actions therefore should not be viewed as punishment in the strict sense, but instead as necessary coercive measures undertaken to obtain compliance with a reasonable prison rule, *i.e.* the requirement that all inmates perform their assigned farm squad duties.

813 F.2d at 325. Furthermore, said the court: "All Ort needed to do before he would be allowed to drink the water was to perform the work required of all the inmates on his farm squad." *Id.* at 326. He "essentially had the keys to the water keg in his own pocket." *Id.* "Whenever he agreed to abide by the prison rules, he would be given water just like everyone else." *Id.* The same was true for Hope in this case.

In the six pre-1995 Section 1983 cases that counsel have been able to locate in which an inmate sued an Alabama prison officer for handcuffing him to a stationary object, the district courts held that the restraint did not violate the Eighth Amendment. Two of these cases involved use of the restraining bar. *Dale* v. *Murphy*, No. CV-85-1091-H-S (S.D. Ala. 1986) (light pole); *Williamson* v. *Anderson*, No. CV-92-H-675-N (M.D. Ala. 1993) (fence); *Hollis* v. *Folsom*, No. CV-94-T-0052-N (M.D. Ala. 1994) (fence); *Vinson* v. *Thompson*, No. CV-94-A-268-N (M.D. Ala. 1994) (restraining bar); *Ashby* v. *Dees*, No. CV-94-U-0605-NE (N.D. Ala. 1994) (fence); *Lane* v. *Findley*, No. CV-93-C-1741-S (N.D. Ala. 1994) (restraining bar). In a 1994 case also involving use of the restraining bar, the district court dismissed the complaint on qualified immunity grounds. *Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala.).

Against all of this authority, petitioner and his amici contend that the lone 1974 decision in *Gates* v. *Collier*, 501 F.2d 1291 (5th Cir.), should have made clear to Pelzer, McClaran, and Gates that the restraining bar was unconstitutional. To arrive at such a conclusion requires a dramatic over-reading of the case. *Gates* was a lawsuit against the Superintendent of the Mississippi State Penitentiary for a large number of alleged prison abuses. The record, according to the Fifth Circuit, was "replete with innumerable instances of physical brutality and abuse in disciplining inmates," including

> administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and to cells for long periods of time,

> shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods.

Id. at 1306. The Fifth Circuit found these and many other abusive practices to violate the Eighth Amendment. Petitioner and his amici, including the United States, would select the phrase "handcuffing inmates to the fence and to cells for long periods of time" from this thirty-page opinion and say that it should outweigh the other authority above and be deemed to have provided Pelzer, McClaran, and Gates with fair warning that they could not put Hope on the restraining bar.

The Fifth Circuit opinion in *Gates* says that the Mississippi prison officers should not have been handcuffing inmates "to the fence and to cells for long periods of time" as a form of corporal punishment, but it says nothing about the justifications they used, the procedures they followed, the lengths of time they put the prisoners on the fence, or the positions in which the prisoners were made to stand. Here, by contrast, McClaran, Pelzer, and Gates put Hope on the bar pursuant to a written prison policy that prescribed humane conditions for when and how the bar could be used. Hope had food, water, bathroom breaks, and medical attention, and he held the keys to his release in his own pocket, in that he could get off the bar any time he agreed to return to work. Hope has not alleged or presented evidence that McClaran, Pelzer, or Gates failed to follow this policy in any respect.

In *Wilson* v. *Layne*, which affirmed a ruling of qualified immunity for United States marshals who brought

reporters with them into homes during the execution of arrest warrants, this Court found it "important to our conclusion" that marshals relied upon a "Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests." 526 U.S. 603, 617 (1999). "Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law." *Id.* The state of law, this Court held, "was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies." *Id.* Here, an Alabama DOC policy explicitly authorized Pelzer, McClaran, and Gates to put Hope on the restraining bar because he disrupted the work crews. To the extent the law was developed, it affirmed the constitutionality of this policy. It was not unreasonable for respondents to rely upon that policy in taking the actions that they took.

III. This Court Should Reject the United States' Suggestion That It Remand For Petitioner to Engage in Discovery.

Amicus United States seems to recognize that the "limited record" (Br. 26) does not establish that Pelzer, McClaran or Gates violated any of Hope's clearly established rights. They suggest at the end of their brief that petitioner should be allowed more time for discovery to develop his case. Thereafter, "if such future discovery failed to uncover facts that establish a genuine issue as to whether respondents violated clearly established law, respondents would be entitled to immunity and summary judgment." Br. 26.

One of the chief purposes of qualified immunity is "to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.' " *Anderson*, 483 U.S. at 646 n. 6 (quoting *Harlow*, 457 U.S. at 817). Indeed, "it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814. These costs include "the expenses of litigation" and "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties" as public officials. *Id.* (quotation omitted). Accordingly, "qualified immunity questions should be resolved at the earliest possible stage." *Anderson*, 483 U.S. at 646 n. 6.

Petitioner's counsel had two and a half years, from the time he appeared on petitioner's behalf to the time of summary judgment, to discover facts and make more specific allegations against the respondents. If this Court were to remand due to a "limited record" that is petitioner's own responsibility, it would vitiate the protections that are supposed to be afforded by qualified immunity. The district court awarded summary judgment at the appropriate stage in the litigation. The suggestion of the United States should be rejected.

CONCLUSION

Under any standard of qualified immunity, the combined authority of Eighth Amendment jurisprudence and Regulation 429 did not "clearly establish" to Pelzer, McClaran, and Gates that putting Hope on the restraining bar was unconstitutional. Indeed, respondents submit that the authority indicates the opposite: use of the bar in accordance with Regulation 429 was and is constitutional. For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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